IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
Assigned on Briefs July 22, 2008

STATE OF TENNESSEE v. WADE MCKINLEY STAGGS, SR.

Appeal from the Circuit Court for Marshall County
Nos. 17070, 17071 Robert Crigler, Judge

No. M2007-01228-CCA-R3-CD - Filed February 13, 2009

The Defendant, Wade McKinley Staggs, Sr., was convicted of fifty-nine counts of sexual exploitation of a minor, each a Class E felony. He was sentenced as a Range I, standard offender to ten years in the Department of Correction. In this direct appeal, he argues that (1) the trial court erred in denying his motion to suppress a compact disc containing images of alleged child pornography; (2) the trial court allowed certain witnesses to testify against him in violation of Tennessee Rule of Evidence 404(b); (3) the State presented evidence insufficient to convict him; (4) fifty-eight of his fifty-nine convictions are multiplicitous; and (5) the trial court erred at sentencing by violating his rights under the Sixth Amendment to the United States Constitution; improperly applying enhancing and mitigating factors; improperly ordering him to consecutively serve his sentences for certain counts; and denying him alternative sentencing. We conclude that the trial court properly denied the Defendant's motion to suppress and properly overruled his other evidentiary objections, and that the State produced evidence sufficient to convict the Defendant of fifty-seven counts of sexual exploitation of a minor. Regardless of evidentiary sufficiency, however, we agree that fifty-six of the Defendant's remaining convictions are multiplicitous, and that the trial court improperly enhanced the Defendant's sentences and improperly ordered consecutive sentences. We conclude that the trial court did not err by denying alternative sentencing. We accordingly vacate fifty-eight of the Defendant's judgments of conviction and remand for resentencing consistent with this opinion.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed in Part; Reversed in Part; Remanded

DAVID H. WELLES, J., delivered the opinion of the court, in which ROBERT W. WEDEMEYER and D. KELLY THOMAS, JJ., joined.

Hershell Koger, Pulaski, Tennessee, for the appellant, Wade McKinley Staggs, Sr.

Robert E. Cooper, Jr., Attorney General and Reporter; Jennifer L. Bledsoe, Assistant Attorney General; Charles Crawford, District Attorney General, and Weakley E. Barnard, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

Factual Background

The State tried fifty-nine counts of sexual explitation of a minor against the Defendant on November 13 and 14, 2006. Eight counts were contained in one indictment and fifty-one counts were set forth in a second indictment. Testimony at trial indicated that the events underlying both indictments took place between June 2004 and January 2005. Some time in the summer of 2004 Mike Wakham visited the Defendant at Quality Electronics (QE), an electronics repair shop the Defendant owned and operated at the time in Lewisburg. Wakham testified that he had first encountered the Defendant over CB radio ten or eleven years before. He met him in person shortly thereafter. They had occasionally spent time with each other ever since.

Wakham walked to QE's back room, where the Defendant sat in front of a computer. At some point the Defendant directed Wakham to look at the computer screen; when Wakham did so, he saw a frontal image of a fully naked "undeveloped" female child "six, seven, eight years old" standing in front of a couch. He told the Defendant, "you're sick." "[The Defendant] said yeah, I know it, and just kind of giggled." Wakham chose not to maintain contact with the Defendant thereafter, but he did not tell anyone about the incident until the investigation of the Defendant began.

Wade "Joe" Staggs, Jr., one of the Defendant's sons, also testified. He said that it had been his practice to periodically visit QE for the purpose of working on televisions, computers, and CB radios with the Defendant. On one occasion in June or July 2004, Joe went to QE to help the Defendant move some televisions around. When he first walked into the store, he saw the Defendant at the computer. The Defendant turned the screen so Joe could see it, revealing a frontal image of a naked girl with her arms to her side. She had "no pubic hair, no breast developed, it was just flat." On this basis, Joe estimated her age at either nine or ten. He did not tell anyone about the incident until the investigation of the Defendant began.

Brian Staggs, another of the Defendant's sons, testified that he had occasionally gone to QE to help the Defendant clean or to help move televisions. He had also gone into the shop after hours to educate himself about computers. At some time in 2004, Brian observed the Defendant using the computer in the back room at QE. Brian said that an image "popped up" on the computer while the Defendant perused some files he had recently downloaded. The image showed a young girl about ten to twelve years old sitting on a couch wearing only a shirt. Seeing the image, the Defendant said, "That's not supposed to be there." Brian saw the same image on a few other occasions, however. He did not tell anyone about the image until the investigation of the Defendant began.

In November or December 2004, Brian asked the Defendant to burn some music files onto a compact disc (CD) for him. The Defendant did so at QE, in Brian's presence, burning the materials onto one of his own CDs. Brian returned home and put the CD in his own computer. When he opened the CD on his computer, he discovered that it contained several images of partially or fully nude "underdeveloped" females in addition to the expected music files. Brian believed the pictured females were under eighteen years old.

Jason Staggs, another of the Defendant's sons, also testified at trial. He noted that the Defendant owned QE for a total of two to three years. The Defendant had divorced Brian's mother, Audrey Kelly, when Jason was a small child. The Defendant remarried during the time he owned QE.

Jason had some proficiency with computers. He also had some knowledge of the Defendant's computer, having spent about a month assisting the Defendant at QE. The Defendant had built his own computer and had included at least two hard drives. Jason testified that the Defendant never allowed anyone to use his computer. Jason had, on a few occasions, seen what he believed to be child pornography images on the Defendant's computer as the Defendant operated it. He also, much like his brother Brian, had in the past asked the Defendant to burn certain programs on CDs for him; upon receiving those CDs, Jason had discovered they contained child pornography images along with the requested programs. This happened three times. Jason no longer had any of those CDs, however, because his fiancé destroyed them. These experiences led Jason to believe the Defendant had child pornography on his computer.

In November 2004, Jason learned from Kelly, his mother, that the Tennessee Bureau of Investigation (TBI) was interested in the Defendant. Jason was not told the name of a specific TBI agent, and he testified that no one told him to take any action. In December 2004, however, Jason went to QE at a time when the Defendant was not present. Without the Defendant's permission, he took one of the Defendant's blank CDs and burned onto it, from the Defendant's computer, what he believed to be a number of child pornography images. He wrote "Wade's PC pics" on the CD itself and placed the CD in a paper sleeve.

Jason then left QE and brought the CD to his mother's apartment. Jason's stepfather and niece also lived there at the time. None of the three knew how to use a computer, and they did not own a computer. Upon arriving at the house, Jason wrote "Mom don't lose" on the CD's sleeve and placed it in a drawer in the living room. The CD was a one-time writeable disc, meaning that content could not be added or removed.

Audrey Kelly largely confirmed Jason's testimony. She testified that she had learned, sometime before December 2004, of a possible TBI investigation of the Defendant. She had relayed that information to Jason. He then, without any request from her, brought a CD to her apartment and put it in a drawer. At that time, Jason did not tell her what was on the CD. One or two days later, Brian, learning of the potential TBI investigation, volunteered to Ms. Kelly that he had some knowledge of the Defendant possessing child pornography. One or two days after that, Jason told

Ms. Kelly that the CD he had left at her apartment contained a number of images of child pornography from the Defendant's computer. At no time did Ms. Kelly touch or alter this CD.

TBI Special Agent Wayne Wesson investigated the Defendant. Ruby Mangrum, Ms. Kelly's sister and Jason, Joe and Brian's aunt, had been the first to provide him with some evidence that the Defendant had child pornography in his possession.[1] On that basis, the district attorney issued a formal request for the TBI to investigate the Defendant.

Agent Wesson first obtained Jason's phone number. Both Jason and Agent Wesson testified that they spoke on the phone and arranged to meet at Jason's apartment on January 11, 2005. Before the meeting, Jason testified he returned to Ms. Kelly's apartment and retrieved the CD he had left there, finding it in the same drawer he had put it in.

Jason met with Agent Wesson and gave him the CD. Agent Wesson testified that he wrote "To TBI from Jason Staggs 1-11 of 05" on the back of the CD's sleeve. This CD was introduced at trial as Exhibit 2, and it contained more than 800 images, which the State used to support the fifty-one counts of sexual exploitation of a minor in the second indictment against the Defendant.

Jason also gave Brian's phone number to Agent Wesson. Brian received a call from Agent Wesson shortly thereafter and arranged to meet him on January 14, 2005, at Brian's house. Brian and Agent Wesson both testified that at that meeting, Brian gave Agent Wesson the CD he had received from the Defendant. Brian did so after placing the CD in his own computer and showing Agent Wesson the images it contained. Brian testified that he had not altered the CD in any way between receiving it from the Defendant and giving it to Agent Wesson. On cross-examination, Brian noted that he had blank CDs and a dial-up internet connection in his home. He also said he believed the CD he had received from the Defendant was such that more files could have been added to it after it was first burned. Brian did not see the Defendant download any child pornography images while making the CD for him.

This CD was introduced as Exhibit One and contained the eight images the State used to support the eight counts of sexual exploitation of a minor charged in its first indictment against the Defendant.

Agent Wesson testified that he did not confiscate Brian or Jason's computer. He maintained custody of both CDs until he delivered them to the TBI lab, requesting that they be examined for images of child pornography. Special Agent Doug Williams of the TBI Technical Services Unit examined the CDs. The trial court qualified him as an expert in computer evidence recovery. Agent Williams testified that Exhibit One contained some system files and some image files. Eight of the image files were of child pornography. He testified regarding these images while using a computer to display each image to the jury. He confirmed that the images displayed were true and accurate

[1] Mangrum did not testify at trial.

representations of the images contained on Exhibit One. The Exhibit One images were themselves introduced as Exhibits Three through Ten, supporting one count per image.

Agent Williams also examined Exhibit Two, finding multiple images of child pornography. He also displayed these to the jury one by one, affirming that the images displayed were true and accurate representations of the images contained on Exhibit Two. In describing each Exhibit Two image, Agent Williams noted whether the participant pictured in the image appeared to be the same participant as in the previous image, and he noted the name of any web address included in the image. In this way, Agent Williams identified a number of picture groups that depicted the same participant in the same setting. Typically the first picture in these groups showed a fully clothed participant; the last picture showed a nude or nearly nude participant, her clothes having been incrementally removed as the pictures progressed.

The Exhibit Two images contained fifty-one unique participant/setting combinations. The State introduced each picture or pictures depicting such a combination as a separate exhibit, meaning that the Exhibit Two images were themselves introduced as Exhibits Eleven through Sixty-One.

In addition to displaying them to the jury during Agent Williams' testimony, the State printed copies of all the images contained on Exhibits One and Two and assembled them into books for the jurors to use during their deliberations. Agent Williams testified that each of these printed images was a true and accurate representation of the images found on Exhibits One and Two. Agent Williams also noted that he had labeled each image printout with the number of the CD it came from, as well as the count to which it belonged.

On cross-examination, Agent Williams admitted that his examination did not reveal who had originally downloaded any of the material on either CD. He also could not determine on what date or at what time any of the images had been downloaded. The State also was unable to prove the age of any of the participants in the images on either CD.

Lisa Ferguson also testified for the State. She began babysitting for the Defendant and his wife in January 2005. The Defendant had recently closed QE; he and his wife hired Ferguson to watch their children during the day. Ferguson testified that on one evening that January, she observed the Defendant using his computer in the living room. The Defendant asked her to come over and look at the computer screen, which she did. On the screen, Ferguson saw the image of a child of "ten or younger" being vaginally penetrated by a "grown man." She quickly looked away from the screen. Ferguson told her parents about the incident a few days later, but she admitted on cross-examination that she continued to work for the Defendant and his wife for an additional six months to one year. She had never been to QE.

The Defendant did not testify or introduce any evidence in his defense.

The jury convicted the Defendant of each of the fifty-nine counts of sexual exploitation of a minor charged in the two cases against him. The trial court sentenced him as a Range I, standard

offender to the maximum sentence of two years for each conviction. The trial court ordered partial consecutive sentences, for an effective sentence of ten years in the Department of Correction. The Defendant now appeals.

Analysis

I. Denial of Defense Motion to Suppress

On July 7, 2006, the trial court held a pre-trial hearing on a motion to suppress made by the Defendant. The Defendant asked the trial court to exclude the CD eventually marked as Exhibit 2 because, he argued, Jason Staggs was an agent of the government when he obtained it. Jason Staggs testified at the pre-trial hearing, as he later did at trial, that he had never spoken to Agent Wesson before giving him the CD and that he obtained the CD of his own accord. Agent Wesson also testified, stating that he had not asked anyone to obtain evidence for him. Kelly also testified that she had not done so and that she had the CD in her apartment for three weeks to a month before Jason spoke to Agent Wesson. Mangrum, Kelly's sister and the person who had originally informed Agent Wesson of the Defendant's possible possession of child pornography, testified that to her knowledge, Jason had the CD before ever speaking to Wesson and that neither she nor Wesson had ever instructed anyone to obtain evidence against the Defendant.

Marshall Campbell, an investigator for the public defender's office, also testified. He noted that he had interviewed Jason after listening to a tape of the Defendant's preliminary hearing. Campbell said that Jason had admitted to burning the CD at Agent Wesson's request. Campbell also testified to Jason's statement that, upon receipt of the CD, Wesson asked him to make a second CD but that Jason refused. Finally, Campbell said that, in a second conversation immediately before the suppression hearing, Jason had changed his story and claimed that he obtained the CD of his own volition.

Our supreme court instructs us that "in evaluating the correctness of a trial court's ruling on a pretrial motion to suppress, appellate courts may consider the proof adduced both at the suppression hearing and at trial." State v. Henning, 975 S.W.2d 290, 299 (Tenn. 1998). When reviewing a trial court's ruling on a motion to suppress, "[q]uestions of credibility of the witnesses, the weight and value of the evidence, and resolution of conflicts in the evidence are matters entrusted to the trial judge as the trier of fact." State v. Odom, 928 S.W.2d 18, 23 (Tenn. 1996). Findings of fact made by a trial court in ruling on a motion to suppress are binding upon this Court unless the evidence preponderates against the findings. Id. However, "[t]he application of the law to the facts found by the trial court . . . is a question of law which this court reviews de novo." State .v Yeargan, 958 S.W.2d 626, 629 (Tenn. 1997).

In these cases, the State located and played at the pre-trial hearing a tape of Campbell's first meeting with Jason. This tape is not present in the record on appeal, and the pre-trial hearing transcript does not include its contents. As such, we are limited to transcribed testimony in conducting our review of the trial court's findings of fact. In making those findings, the trial court evidently found the testimony offered by Jason, Ms. Kelly, Ms. Mangrum, and Agent Wesson to be more credible than the contradictory testimony offered by Campbell. Because this is primarily a

credibility issue, we cannot conclude that the evidence preponderates against the trial court's finding that Jason obtained the CD of his own accord. We are therefore bound by that finding.

A. State Agency

In State v. Burroughs, 926 S.W.2d 243 (Tenn. 1996), our supreme court addressed the issue of when a private party becomes an agent of the State when conducting a search or seizure. It noted the following:

> The Fourth Amendment, made applicable to the states through the Fourteenth Amendment, by definition protects against unreasonable state-conducted searches and seizures. U.S. Const. Amends. IV, XIV. It exists, primarily, for the benefit of the citizen; its origin and history clearly manifest that the Fourth Amendment was intended as a restraint upon the activities of the sovereign authority to the extent that a citizen may be secure in the unmolested enjoyment of home and possessions, except by virtue of process duly issued. This intention was reinforced in Burdeau v. McDowell, 256 U.S. 465 (1921). In Burdeau, the United States Supreme Court held that the Fourth Amendment limits only governmental activity; consequently, evidence secured by private persons and, perhaps, by illegal means need not be excluded from evidence in a criminal trial. . . . [T]he issue of precisely how and when private conduct in this context is chargeable to the state frequently has been litigated with mixed results.

Burroughs, 926 S.W.2d at 245. In resolving this issue, our supreme court adopted the "legitimate independent motivation" test outlined by the Ninth Circuit Court of Appeals in United States v. Walther, 652 F.2d 788 (9th Cir. 1981). That case identifies "two of the critical factors in the 'agent or instrument' analysis": "(1) the government's knowledge and acquiescence" to the private party's search "and (2) the intent of the party performing the search." Id. at 792. The second prong, according to our supreme court, requires an examination of whether the private party who conducted the contested search acted "for a reason independent of . . . a governmental purpose" such as an "investigative or administrative function." Burroughs, 926 S.W.2d at 246. If the party acted for an independent reason, the Fourth Amendment is not implicated.

Such was the case in Burroughs; the private party in that case searched a dorm room "in furtherance of college policy, not state policy." Id. Because the supreme court disposed of the case using only the second prong of the Walther test, it did not explicitly say whether both prongs must be found in order to render a private party an "agent or instrument" of the state. Further examination of Walther indicates that both prongs are required, however. In that case, the Ninth Circuit found that a baggage handler opened a piece of luggage "with the requisite mental state of an 'instrument or agent'" and that his prior experience working with the government provided "proof of the government's acquiescence in the search." Walther, 652 F.2d at 792-93. Having found both, it held that the baggage handler acted as an agent of the state for Fourth Amendment purposes.

Applying prong two to these cases, we conclude that Jason Staggs had an investigatory, governmental purpose in searching the Defendant's computer and seizing images from it. Although he had not spoken to any government agent, Jason learned in November 2004 of a possible TBI investigation of his father. In December 2004, he created the CD later designated Exhibit Two. He then placed it in Ms. Kelly's house for safekeeping. A few weeks later, he asked Ms. Kelly and Ms. Mangrum to have Agent Wesson call him. He arranged to meet Agent Wesson and give Exhibit Two to him for use against his father. The record contains no indication that Jason had any motivation in taking these actions other than to assist the TBI in its investigation of the Defendant.

Turning to prong one, however, we conclude that the TBI did not harbor the "knowledge and acquiescence" necessary to transform Jason into an agent of the state. Agent Wesson did not direct Jason to obtain Exhibit Two nor did he direct anyone else to request that Jason do so. We note that state officials also had no knowledge of the particular search at issue in Walther at the time the baggage handler conducted it and that he was held to be an agent of the state nonetheless. Id. at 793. That was so, however, because the baggage handler had previously searched packages at the state's direction and had been encouraged to conduct that type of search. Id. No such previous contacts between Jason and the TBI appear in evidence in these cases. Accordingly, we conclude that Jason was not an "agent or instrument" of the state when he created Exhibit Two and delivered it to Agent Wesson.

B. Illegally Obtained Evidence

The Defendant also claims that Jason obtained the CD in violation of the Tennessee Personal and Commercial Computer Act of 2003, which states in relevant part that:

> (a) Whoever knowingly, directly or indirectly, accesses, causes to be accessed, or attempts to access any . . . computer . . . for the purpose of:
>
> > (1) Obtaining money, property, or services for oneself or another by means of false or fraudulent pretenses, representations, or promises violates this subsection (a) and is subject to the penalties of § 39-14-105.

Tenn. Code Ann. § 39-14-602. On this basis, the Defendant argues that the CD should have been excluded as "improper" evidence, apparently as a violation of his rights under the Fourth Amendment to the United States Constitution. The State notes that the Defendant failed to raise this issue during his motion to suppress or in his motion for a new trial; the issue is therefore waived. See Tenn. R. App. P. 3(e).

We will briefly discuss the issue's merits, however. We express no opinion on whether Jason violated any law. Even assuming he did, however, we note that "the Fourth Amendment proscribes only governmental action, and does not apply to a search or seizure, even an unreasonable one, effected by a private individual not acting as an agent of the government or with the participation or knowledge of any government official." U.S. v. Coleman, 628 F.2d 961, 964-65 (6th Cir. 1980) (citing Burdeau v. McDowell, 265 U.S. 465 (1921)). Given our conclusion above that Jason did not

act as a government agent, the Defendant would not be entitled to relief on this issue under a de novo review.

We conclude that the trial court did not err in denying the Defendant's motion to suppress Exhibit Two.

II. Admission of Testimony under Tennessee Rule of Evidence 404(b)

The Defendant next contends that Wakham, Ferguson, Joe, Jason, and Brian were allowed, in violation of Tennessee Rule of Evidence 404(b), to testify regarding his prior bad acts. With respect to Wakham, Ferguson, Joe, and Brian, the Defendant contends that the trial court erred in admitting their testimony that he had shown them child pornography images on his computer screen. The Defendant also contends that the trial court erred in admitting Jason's testimony that he had previously received three CDs containing child pornography from the Defendant.

Tennessee Rule of Evidence 404 provides:

> (b) Other Crimes, Wrongs, or Acts. – Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity with the character trait. It may, however, be admissible for other purposes. The conditions which must be satisfied before allowing such evidence are:
>
> > (1) The court upon request must hold a hearing outside the jury's presence;
> > (2) The court must determine that a material issue exists other than conduct conforming with a character trait and must upon request state on the record the material issue, the ruling, and the reasons for admitting the evidence;
> > (3) The court must find proof of the other crime, wrong, or act to be clear and convincing; and
> > (4) The court must exclude the evidence if its probative value is outweighed by the danger of unfair prejudice.

On appeal, we afford no deference to a trial court's Rule 404(b) decisions unless there has been "substantial compliance" with the Rule's procedural requirements. State v. Dubose, 953 S.W.2d 649, 652. Where the trial court substantially complied with these requirements, we review its decisions under an abuse of discretion standard. Id.

The trial court in these cases held a Rule 404(b) hearing immediately before trial, in which it heard testimony from Wakham, Ferguson, Joe, Jason, and Brian.[2] The "other purpose" for which the State offered these witnesses was to prove, as required for a conviction of sexual exploitation of a minor, that the Defendant "knowingly" possessed the images contained on Exhibits One and Two.

[2]The State also presented a sixth "other crimes, wrongs, or acts" witness, Scott Stinson. It withdrew him, however, when he indicated in his testimony that he may only have seen adult pornography images on the Defendant's computer.

After each witness' testimony, the trial court placed on the record findings substantially similar to these, made after Ferguson's testimony:

> [The Court]: All right. I'm going to make a finding that there is a material issue as to the element of the [D]efendant knowingly possessing the material in question. And that was raised by counsel at voir dire. The defense did not seek to defend this on the basis that there were not – that the persons in these pictures were not minors. That could have been a possible defense within the age, or you could have argued that there was no sexual activity. And there'd have been a definition over whether the photographs depict sexual activity or simulated sexual activity or not.
>
> But the defense did frame the issue as the mens rea of knowing possession, not just possession, but knowing possession. And it appears that that obviously is a material issue, it's an element of the offense. It couldn't be much more material.
>
> I do find that the proof of this incident that Ms. Ferguson testified to be clear and convincing. That is that the [D]efendant showed her a photograph of a man and a child – or some kind of female, she said had to be under 10 years of age, performing sexual acts on the child. That it was showed to her by the [D]efendant on his computer.

The presence of these findings in the record leads us to conclude that the trial court substantially complied with Rule 404(b)(1)-(3).

As for the Rule 404(b)(4) requirement, the court neglected to mention its finding that the probative value of Ferguson's testimony outweighed any danger of unfair prejudice. It specifically noted that finding after the testimony of every other witness and allowed Ferguson to testify at trial, however; as a result we are satisfied that the trial court found that the probative value of each witness' testimony outweighed the danger of unfair prejudice. The Defendant argues that the trial court erred in making this finding and that it should have found that the danger of unfair prejudice outweighed any probative value on the issue of the Defendant's knowledge.

We acknowledge the Defendant's argument that admission of evidence of prior crimes "easily results in a jury improperly convicting a Defendant for his or her bad character or apparent propensity or disposition to commit a crime regardless of the strength of the evidence concerning the offense at trial." State v. Rickman, 876 S.W.2d 824, 828 (Tenn. 1994) (citing Anderson v. State, 56 S.W.2d 731 (Tenn. 1933)). "Such a potential particularly exists when the conduct or acts are similar to the crimes on trial," as they are in these cases. Id. (citing State v. Parton, 694 S.W.2d 299, 303 (Tenn. 1985)). We disagree with the Defendant's suggestion that admission of similar crimes is categorically improper, however. In discussing the admission of prior acts of rape in a trial for aggravated rape, our supreme court has stated that "[w]hen the presence or absence of a particular intent which is necessary to constitute the crime charged is a contested issue, and evidence of a prior

crime tends to show that intent, it may render the prior crime admissible." Parton, 694 S.W.2d at 303 (citing Mays v. State, 238 S.W.2d 1096, 1103 (1921)).

This reasoning also applies to the Defendant's knowledge that his computer contained images of child pornography. The testimony admitted over the Defendant's Rule 404(b) objection had substantial probative value with respect to the contested issue, the knowledge required to constitute the crime of sexual exploitation of a minor. Brian and Jason, in respectively obtaining Exhibits One and Two, did not witness the Defendant viewing the images contained on either CD. The issue of his knowledge thus remained to be proven by other evidence. Wakham, Joe, and Brian all testified that, within one to three months of the conduct charged in these cases, they saw the Defendant viewing child pornography images on the same computer that held the evidence contained on Exhibits One and Two. Ferguson testified that she saw the Defendant viewing child pornography images on a computer. Brian's testimony, perhaps the least probative on the issue of knowledge, still established that the Defendant had placed child pornography images onto a blank CD, along with other programs, on at least three occasions prior to his creation of Exhibit One.

We conclude that this significantly probative value outweighed the danger of unfair prejudice to the Defendant. As such, the trial court substantially complied with the requirements of Rule 404(b) and did not abuse its discretion.

III. Sufficiency of the Evidence

Tennessee Rule of Appellate Procedure 13(e) prescribes that "[f]indings of guilt in criminal actions whether by the trial court or jury shall be set aside if the evidence is insufficient to support the findings by the trier of fact of guilt beyond a reasonable doubt." A convicted criminal defendant who challenges the sufficiency of the evidence on appeal bears the burden of demonstrating why the evidence is insufficient to support the verdict, because a verdict of guilt destroys the presumption of innocence and imposes a presumption of guilt. See State v. Evans, 108 S.W.3d 231, 237 (Tenn. 2003); State v. Carruthers, 35 S.W.3d 516, 557-58 (Tenn. 2000); State v. Tuggle, 639 S.W.2d 913, 914 (Tenn. 1982). This Court must reject a convicted criminal defendant's challenge to the sufficiency of the evidence if, after considering the evidence in a light most favorable to the prosecution, we determine that any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. See Jackson v. Virginia, 443 U.S. 307, 319 (1979); State v. Hall, 8 S.W.3d 593, 599 (Tenn. 1999).

On appeal, the State is entitled to the strongest legitimate view of the evidence and all reasonable and legitimate inferences which may be drawn therefrom. See Carruthers, 35 S.W.3d at 558; Hall, 8 S.W.3d at 599. A guilty verdict by the trier of fact accredits the testimony of the State's witnesses and resolves all conflicts in the evidence in favor of the prosecution's theory. See State v. Bland, 958 S.W.2d 651, 659 (Tenn. 1997). Questions about the credibility of witnesses, the weight and value of the evidence, as well as all factual issues raised by the evidence are resolved by the trier of fact, and this Court will not re-weigh or re-evaluate the evidence. See Evans, 108 S.W.3d at 236; Bland, 958 S.W.2d at 659. Nor will this Court substitute its own inferences drawn from

circumstantial evidence for those drawn by the trier of fact. See Evans, 108 S.W.3d at 236-37; Carruthers, 35 S.W.3d at 557.

At the time of the Defendant's conduct, Tennessee Code Annotated section 39-17-1003 (2003) provided as follows:

> (a) It is unlawful for any person to knowingly possess material that includes a minor engaged in:
>
> (1) Sexual activity; or
>
> (2) Simulated sexual activity that is patently offensive.
>
> (b) In a prosecution under this section, the trier of fact may infer that a participant is a minor if the material through its title, text, visual representation or otherwise represents or depicts the participant as a minor.
>
> (c) A violation of this section is a Class E felony.[3]

The Defendant challenges the sufficiency of the evidence used to convict him on two grounds. First, he contends that a number of the images used to convict him do not include a minor engaged in sexual activity or simulated sexual activity that is patently offensive. Second, he contends that the State failed to prove that he knowingly possessed the images on Exhibits One or Two. We will later address the Defendant's separate argument that fifty-eight of the counts against him were multiplicitous; here, we simply address whether the State presented evidence sufficient to support each count as constituted at trial.

A. Minor Engaged in Sexual Activity

We first address the Defendant's argument that many of the images used to convict him do not include a minor engaged in sexual activity or simulated sexual activity that is patently offensive. The first and second images contained on Exhibit One form the first and second counts against the Defendant; the Defendant notes that these images are drawings depicting minors engaged in sexual activity. As such, the Defendant argues that the images do not "include a minor" in the sense criminalized by Tennessee Code Annotated section 39-17-1003. We agree, as does the State on appeal. A "minor" is "any person who has not reached eighteen (18) years of age." Tenn. Code Ann. § 39-17-1002(3). Because the drawings are not images of an actual person, the "children" depicted in the images are not minors. Indeed, the statute would likely be overbroad under the First Amendment to the United States Constitution if it did criminalize these two images. See Ashcroft v. Free Speech Coalition, 535 U.S. 234, 257 (2002).

The Defendant concedes that the remaining images include human participants, and that the images constitute "material." See Tenn. Code Ann. § 39-17-1002(2). He attacks many of them on at least one of two grounds, however. First, he contends that some of the images contain female

[3] Under current law, if the number of images possessed is fifty or fewer, the offense is graded as a Class D felony. Depending on the number of images possessed, the offense may be graded as high as a Class B felony. See Tenn. Code Ann. § 39-17-1003(d) (2005).

participants that the jury incorrectly found to be minors. After our review of the images, however, we conclude that any rational jury could infer that the participant or participants in each are minors. See Tenn. Code Ann. 39-17-1003(b)(2003).

Second, the Defendant contends that the minors displayed in some images are not engaged in "sexual activity" as defined in Tennessee Code Annotated section 39-17-1002(8). According to that section, "sexual activity" includes in relevant part "[v]aginal, anal, or oral intercourse . . ." or "[l]ascivious exhibition of the female breast or the genitals, buttocks, anus, or pubic or rectal area of any person." Tenn. Code Ann. § 39-14-1002(8)(A), (G). The Defendant directs our attention primarily to certain portions of the multi-image counts found on Exhibit Two. Because most of those multi-image counts display the participant progressively removing her clothes from image to image, most of them include a number of pictures in which the participant poses for the camera while fully clothed.

The Defendant argues that these images do not include a minor engaged in sexual activity because they do not lasciviously exhibit the female breast or the genitals, buttocks, anus, or pubic or rectal area of any person. See Tenn. Code Ann. § 39-14-1002(8)(G). We agree. This does not adversely affect the sufficiency of the evidence against him on any of the multi-image counts, however. Each of those counts includes at least one picture, and in all cases many more than one, of a minor engaging in activity that qualifies as "sexual" under either Tennessee Code Annotated 39-14-1002(8)(A) or (G). The sufficiency of the evidence for each of the multi-image counts would have been unchanged, in other words, had the State chosen not to introduce into evidence the pictures of the fully clothed participants.

We therefore conclude that each of the Exhibit Two multi-image counts is supported by pictures of a minor engaged in sexual activity. We also conclude that each of the Exhibit One and Two single-image counts contains a minor engaged in sexual activity, except for the drawings supporting counts one and two from Exhibit One.

B. Knowing Possession

The Defendant next argues that the State did not prove he knowingly possessed child pornography. We agree with his contention that the evidence he knowingly possessed the images is largely circumstantial, and that therefore a "web of guilt must be woven around the [D]efendant from which he cannot escape and from which facts and circumstances the jury could draw no other reasonable inference save the guilt of the [D]efendant beyond a reasonable doubt." State v. Crawford, 470 S.W.2d 610, 613 (Tenn. 1971).

The State presented substantial evidence that the Defendant possessed child pornography images, however. Brian Staggs testified that he personally observed the Defendant use his own computer to create Exhibit One, a CD later discovered to contain such images. Jason Staggs testified that he personally used the Defendant's computer to burn hundreds of child pornography images onto the CD designated Exhibit Two at trial. The jury was entitled to credit the testimony of these two witnesses.

The State also presented substantial evidence that the Defendant knew images of child pornography were in his possession. "'Knowing' refers to a person who acts knowingly with respect to the conduct or to circumstances surrounding the conduct when the person is aware of the nature of the conduct or that the circumstances exist." Tenn. Code Ann. § 39-11-302(b). Three of the Defendant's sons, as well as Mike Wakham, a former friend of his, and Lisa Ferguson, a babysitter he formerly employed, testified at trial that within months of the conduct charged in these indictments, the Defendant had either shown them child pornography images on his computer or given them CDs containing child pornography images. We have concluded that admission of these witnesses' testimony did not violate Tennessee Rule of Evidence 404(b) because their testimony tended to establish the Defendant's knowing mental state. Any rational jury hearing this testimony could find that the Defendant was aware of the presence of child pornography images on his computer.

We therefore conclude that the State presented sufficient evidence to establish the Defendant's guilt under counts three through eight from Exhibit One, and under all fifty-one counts from Exhibit Two. We vacate his convictions under counts one and two from Exhibit One.

IV. Multiplicity

The Defendant next contends that fifty-eight of the fifty-nine counts against him are multiplicitous, and we analyze this claim without regard to our decision, above, that the State presented insufficient evidence to convict him of counts one and two from Exhibit One. The Defendant did not raise multiplicity as an error at trial or in his motion for a new trial; he has therefore waived the issue unless he can demonstrate plain error. See Tenn. R. App. P. 3(e); Tenn. R. App. P. 36(a); Tenn. R. Crim P. 52(b).

Tennessee Rule of Criminal Procedure 52(b) states that "[w]hen necessary to do substantial justice, an appellate court may consider an error that has affected the substantial rights of an accused at any time, even though the error was not raised in the motion for a new trial or assigned as error on appeal." Plain error requires a defendant to establish five factors: (1) "the record must clearly establish what happened in the trial court"; (2) "a clear and unequivocal rule of law must have been breached"; (3) "a substantial right of the accused must have been adversely affected"; (4) "the accused did not waive the issue for tactical reasons"; and (5) "consideration of the error is necessary to do substantial justice." State v. Smith, 24 S.W.3d 274, 282 (Tenn. 2000) (adopting the factors outlined in State v. Adkisson, 899 S.W.2d 626, 641-42 (Tenn. Crim. App. 1994)). "All five factors must be established by the record before" an appellate court may "recognize the existence of plain error, and complete consideration of all the factors is not necessary when it is clear from the record that at least one of the factors cannot be established." Smith, 24 S.W.3d at 283.

The doctrine of multiplicity springs from the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution, which states that no person shall "be subject for the same offence to be twice put in jeopardy of life or limb." U.S. Const. amend. V. As our supreme court explained in State v. Phillips, 924 S.W.2d 662 (Tenn. 1996):

> Multiplicity concerns the division of conduct into discrete offenses, creating several offenses out of a single offense. Several general principles determine whether offenses are "stacked" so as to be multiplicitous:
>
> > 1. A single offense may not be divided into separate parts; generally, a single wrongful act may not furnish the basis for more than one criminal prosecution;
> > 2. If each offense charged requires proof of a fact not required in proving the other, the offenses are not multiplicitous; and
> > 3. Where time and location separate and distinguish the commission of the offenses, the offenses cannot be said to have arisen out of a single wrongful act.

Phillips, 924 S.W.2d at 665 (footnotes omitted).

A recent supreme court case, State v. Pickett, 211 S.W.3d 696 (Tenn. 2007), addressed the application of multiplicity doctrine to Tennessee Code Annotated section 39-17-1003 (2003). The defendant in Pickett was convicted of eleven counts of sexual exploitation of a minor. This Court held that ten of his convictions were multiplicitous. Pickett, 211 S.W.3d at 706. The supreme court agreed, noting as follows:

> The proof at [the defendant's] trial established that numerous images were stored in either the temporary Internet file or the unallocated space of [the defendant's] personal computer. Detective Mitchell testified that he was unable to determine when the defendant had accessed the images or from which websites the images had come. Based upon that testimony, the Court of Criminal Appeals concluded that "all of the pictures could have come from a single website and could have been automatically downloaded onto the appellant's hard drive simultaneously." The State did not otherwise attempt to distinguish the offenses by showing that the crimes were separated by time or location or by otherwise demonstrating that [the defendant] formed a new intent as to each image.
>
> Id.

The record on appeal clearly establishes what happened in the trial court in these cases, establishing the first plain error requirement. Smith, 24 S.W.3d at 283. The State concedes that forty-nine of the Defendant's fifty-nine counts are multiplicitous under Pickett. It contends that the remaining ten counts are not, however, by noting that a web address appears on many of the images possessed by the Defendant. Ten unique web addresses appear among these images. On this basis the State argues that it "demonstrated [at trial] that many of the images in question came from several different websites."

The State therefore suggests that the appearance of certain web addresses, on images contained on the Defendant's computer, proves that the Defendant downloaded the images from

those web addresses. No testimony at trial established the truth of this factual assertion, however. In our view, testimony would be needed to explain the significance of a website address on an image. Perhaps, for example, these images could have been transferred to the Defendant's computer from a CD made by a third party. In the absence of proof otherwise, we conclude that "'all of the pictures could have come from a single website and could have been automatically downloaded onto the Defendant's hard drive simultaneously.'" Pickett, 211 S.W.3d at 706.

A clear and unequivocal rule of law has thus been breached, establishing the second plain error requirement. Smith, 24 S.W.3d at 283. As to the third, a "substantial right" is a right of "fundamental proportions in the indictment process, a right to the proof of every element of the offense, and . . . constitutional in nature." Adkisson, 899 S.W.2d at 639. A defendant's rights under the Double Jeopardy Clause are "substantial." It also does not appear that the Defendant waived his multiplicity objection for any tactical reason, as he had nothing potentially to gain by doing so. This establishes the fourth plain error requirement. Smith, 24 S.W.3d at 283.

Issues that rise to the level of plain error lie within the sound discretion of the appellate court and may be considered: (1) to prevent needless litigation; (2) to prevent injury to the interests of the public; and (3) to prevent prejudice to the judicial process, prevent manifest injustice, or to do substantial justice. See Tenn. R. App. P. 13(b); Tenn. R. Crim. P. 52(b); Adkisson, 899 S.W.2d at 638-39. We exercise our discretion in these cases and conclude that manifest injustice would be done by allowing the Defendant's fifty-eight wrongful convictions to stand.

Having found plain error in the violation of the Defendant's rights under the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution, we must merge all his convictions into one conviction for one count of sexual exploitation of a minor. We remand for resentencing.

V. Sentencing Issues

Before a trial court imposes a sentence upon a convicted criminal defendant, it must consider (a) the evidence adduced at the trial and the sentencing hearing; (b) the presentence report; (c) the principles of sentencing and arguments as to sentencing alternatives; (d) the nature and characteristics of the criminal conduct involved; (e) evidence and information offered by the parties on the enhancement and mitigating factors set forth in Tennessee Code Annotated sections 40-35-113 and 40-35-114; and (f) any statement the defendant wishes to make in the defendant's own behalf about sentencing. See Tenn. Code Ann. § 40-35-210(b); State v. Imfeld, 70 S.W.3d 698, 704 (Tenn. 2002). To facilitate appellate review, the trial court is required to place on the record its reasons for imposing the specific sentence, including the identification of the mitigating and enhancement factors found, the specific facts supporting each enhancement factor found, and the method by which the mitigating and enhancement factors have been evaluated and balanced in determining the sentence. See State v. Samuels, 44 S.W.3d 489, 492 (Tenn. 2001).

Upon a challenge to the sentence imposed, this Court has a duty to conduct a de novo review of the sentence with a presumption that the determinations made by the trial court are correct. See

Tenn. Code Ann. § 40-35-401(d). However, this presumption "is conditioned upon the affirmative showing in the record that the trial court considered the sentencing principles and all relevant facts and circumstances." State v. Ashby, 823 S.W.2d 166, 169 (Tenn. 1991). If our review reflects that the trial court followed the statutory sentencing procedure, that the court imposed a lawful sentence after having given due consideration and proper weight to the factors and principles set out under the sentencing law, and that the trial court's findings of fact are adequately supported by the record, then the presumption is applicable, and we may not modify the sentence even if we would have preferred a different result. See State v. Fletcher, 805 S.W. 2d 785, 789 (Tenn. Crim. App. 1991). We will uphold the sentence imposed by the trial court if (1) the sentence complies with the purposes and principles of the 1989 Sentencing Act and (2) the trial court's findings are adequately supported by the record. See State v. Arnett, 49 S.W.3d 250, 257 (Tenn. 2001). The burden of showing that a sentence is improper is upon the appealing party. See Tenn. Code Ann. § 40-35-401, Sentencing Commission Comments; Arnett, 49 S.W.3d at 257.

A. Length of Sentence

The Defendant argues that the trial court violated his rights under the Sixth Amendment to the United States Constitution by finding enhancement factors by a preponderance of the evidence as forbidden by Blakely v. Washington, 542 U.S. 296, 313 (2004). The 2005 Amendments to Tennessee's Sentencing Reform Act of 1989 brought that act into compliance with Blakely and went into effect on June 7, 2005. The Defendant committed the crimes charged in these cases in late 2004, however, and he did not sign an ex post facto waiver. Based upon anything other than a previous conviction, any enhancement of his sentence based on judicially determined facts violated his Sixth Amendment rights. State v. Gomez, 239 S.W.3d 733, 740 (Tenn. 2007).

We first note that the Defendant has waived this issue by failing to raise it during his sentencing hearing. The issue is therefore waived. Tenn. R. App. P. 36(a) "Nothing in this rule shall be construed as requiring relief to be granted to a party . . . who failed to take whatever action was reasonable available to prevent or nullify the harmful effect of an error."). We may grant relief on this issue, however, if we find all five plain error requirements. See Adkisson, 899 S.W.2d at 641-42.

The Defendant was convicted of fifty-nine Class E felonies as a Range I, standard offender. For a standard offender a Class E felony carries a one to two year sentencing range. Tenn. Code Ann. § 40-35-112(5). The trial court sentenced him, on April 25, 2007, to the maximum of two years on each count, finding as enhancement factors that: the Defendant had a previous history of criminal convictions or criminal behavior, in addition to that necessary to establish his sentencing range; his offense involved more than one victim; the victims of his offenses were particularly vulnerable because of age; and the offenses were committed to gratify the Defendant's desire for pleasure or excitement. See Tenn. Code Ann. § 40-35-114(1), (3), (4), (7). Using Tennessee Code Annotated section 40-35-113(13), the trial court found as a mitigating factor that the Defendant had a history of military service, although it afforded that finding very slight weight.

The trial court's application of Tennessee Code Annotated sections 40-35-114(3), (4), and (7) violated the Defendant's Sixth Amendment rights under Blakely because they were applied to enhance his sentence and were not found by a jury. In applying section 40-35-114(1), the trial court in part took note of three previous criminal convictions on the Defendant's record: one for driving on a suspended license and two for driving an unregistered vehicle. The trial court stated that it placed at most "scant" or "slight" weight on these convictions, however. In finding criminal behavior, however, it placed "great weight" on testimony by the Defendant's daughter, Charlotte Roder, that the Defendant had raped her regularly from her early childhood until she was five years old. Because the fact of this previous criminal behavior was not found by a jury in the form of a "criminal conviction," its use to enhance his sentence also violated the Defendant's Sixth Amendment rights under Blakely.

The sentencing record on appeal is clear, the trial court violated Blakely rules, and the Defendant did not waive his Sixth Amendment objection for tactical reasons. He can thus demonstrate the first, second, and fourth of the plain error requirements.

We also conclude that a substantial right of the Defendant was affected. The Defendant's previous convictions were indeed minor. We recognize that the trial court placed little to no weight on them. The trial court's imposition of the maximum sentence for each conviction was based upon factors which violated the Defendant's rights under the Sixth Amendment to the United States Constitution. We must vacate the sentences and remand for resentencing.

B. Consecutive Sentencing

After sentencing the Defendant to two years for each of his fifty-nine counts, the trial court turned to consecutive sentencing. With respect to the first indictment against the Defendant, which included the eight counts supported by Exhibit One, the trial court ordered him to serve all eight counts concurrent to one another and consecutive to all other counts. With respect to the second indictment against the Defendant, which included the fifty-one counts supported by Exhibit Two, the trial court ordered him to serve counts one through ten concurrent with one another and consecutive to all other counts; counts eleven through twenty concurrent with one another and consecutive to all other counts; counts twenty-one through thirty concurrent with one another and consecutive to all other counts; and counts thirty-one through fifty-one concurrent with one another and consecutive to all other counts. This resulted in five separate groups of concurrent two-year sentences, each group to be served consecutive to the others, for a total effective sentence of ten years to be served in the Department of Correction.

"Whether sentences are to be served concurrently or consecutively is a matter addressed to the sound discretion of the trial court." State v. Adams, 973 S.W.2d 224, 230-31 (Tenn. Crim. App. 1997). The Defendant contends, however, that the trial court abused its discretion in ordering him to serve consecutive sentences as described above. In doing so, the trial court applied Tennessee Code Annotated section 40-35-115(b)(5), which authorizes consecutive sentencing if the court finds that:

> The defendant is convicted of two (2) or more statutory offenses involving sexual abuse of a minor with consideration of the aggravating circumstances arising from the relationship between the defendant and victim or victims, the time span of defendant's undetected sexual activity, the nature and scope of the sexual acts and the extent of the residual, physical, and mental damage to the victim or victims[.]

The court also ordered consecutive sentences because it "[could not] help but be aware that these offenses would be B felonies, a B felony, a single B felony, had they been committed after July 1st, '05." Section 39-17-1003 was amended effective that date.

Tennessee Code Annotated section 40-35-115(d) states that "[s]entences shall be ordered to run concurrently, if the criteria noted previously in subsection (b) are not met, unless consecutive sentences are specifically required by statute or the Tennessee Rules of Criminal Procedure." None of the criteria in section 40-35-115(b) authorize a trial court's consideration of enhanced punishments that have been mandated by a later version of the statute under which a criminal defendant is convicted. As such, the trial court abused its discretion in considering the amended version of section 39-17-1003.

In its application of section 40-35-115(b)(5), the trial court noted as follows:

> [The Court]: While there is no proof in the record of residual physical or mental damage to the victim or victims, it is obvious from the record there are multiple victims.
>
> The Court concludes that it cannot, as juries are instructed, cannot throw its common sense out the window. I have to conclude that these victims suffered residual damage from being posed for these pictures.
>
> Talks about the time span of the defendant's undetected activity. As I mentioned, the indictment covers a time span of November 1st, '04 to December 31st, '04.
>
> I consider that a time span of some significance.
>
> I suppose in the [D]efendant's favor – this involves interpretation.
>
> Looks like the two factors I just mentioned are in favor of finding that as to apply consecutive sentencing. The other is circumstances arising from a relationship between the defendant and victim or victims. Perhaps that is in the [D]efendant's favor. However, I am going to find that 40-35-115 number 5 applies.

We initially note that, given our previous decision to vacate fifty-eight of the Defendant's convictions on multiplicity grounds, the Defendant has no longer been convicted of "two (2) or more statutory offenses." In order to facilitate possible further appellate review, however, we will review the Defendant's consecutive sentences without reference to that decision.

Our review reveals no previous case in which this Court has considered the application of section 40-35-115(b)(5) to section 39-17-1003. "When the plain language of the statute is clear and

unambiguous, we apply the plain language in its normal and accepted use." Boarman v. Jaynes, 109 S.W.3d 286, 291 (Tenn. 2003) (citing State v. Nelson, 23 S.W.3d 270, 271 (Tenn. 2000)). The section at issue requires that a defendant be convicted of "offenses involving sexual abuse of a minor." The noun "abuse," in relevant part, means "misuse" or "physical maltreatment." THE AMERICAN HERITAGE DICTIONARY 4 (4th ed. 2001). In our view, the Defendant was indeed convicted of an offense "involving" sexual abuse of a minor.

The remainder of the section focuses on "the relationship between the defendant and victim or victims," as well as "the defendant's sexual activity" and "the nature and scope of the sexual acts." We conclude that section 40-35-115(b)(5) was intended by the legislature to apply to defendants found to have had sexual contact or sexual relationships with minors. We conclude that the trial court erred by applying this section to the Defendant. Accordingly, we conclude that the trial court erred by ordering consecutive sentences.

C. Denial of Alternative Sentencing

The Defendant next contends that the trial court improperly denied him alternative sentencing. A defendant who does not possess a criminal history showing a clear disregard for society's laws and morals, who has not failed past rehabilitation efforts, and who "is an especially mitigated or standard offender convicted of a Class C, D, or E felony is presumed to be a favorable candidate for alternative sentencing options in the absence of evidence to the contrary." Tenn. Code Ann. § 40-35-102(6); see also State v. Fields, 40 S.W.3d 435, 440 (Tenn. 2001). The following considerations provide guidance regarding what constitutes "evidence to the contrary" which would rebut the presumption of alternative sentencing:

> (A) Confinement is necessary to protect society by restraining a defendant who has a long history of criminal conduct;
>
> (B) Confinement is necessary to avoid depreciating the seriousness of the offense or confinement is particularly suited to provide an effective deterrence to others likely to commit similar offenses; or
>
> (C) Measures less restrictive than confinement have frequently or recently been applied unsuccessfully to the defendant . . . .

Tenn. Code Ann. § 40-35-103(1); see also State v. Hooper, 29 S.W.3d 1, 5 (Tenn. 2000).

Additionally, the principles of sentencing reflect that the sentence should be no greater than that deserved for the offense committed and should be the least severe measure necessary to achieve the purposes for which the sentence is imposed. See Tenn. Code Ann. § 40-35-103(2), (4). The court should also consider the defendant's potential for rehabilitation or treatment in determining the appropriate sentence. See id. § 40-35-103(5).

The trial court acknowledged the Defendant's presumptive eligibility for alternative sentencing. It sentenced the Defendant to confinement, however, based on its finding that his failure to sign his parole officer's sex offender directives, as well as his unwillingness to demonstrate remorse, showed poor potential for rehabilitation. The trial court also found confinement necessary to avoid depreciating the seriousness of the Defendant's offense and to provide an effective deterrent.

Having placed on the record its consideration of alternative sentencing principles and all relevant facts and circumstances, the trial court is entitled to a presumption of correctness on this determination. See Tenn. Code Ann. § 40-35-401(d), see also Ashby, 823 S.W.2d at 169. After review, we conclude that the trial court did not err in denying the Defendant alternative sentencing.

Conclusion

Based on the foregoing authorities and reasoning, we conclude that the State presented insufficient evidence to convict the Defendant on two of his fifty-nine counts of sexual exploitation of a minor, and we vacate these two convictions. We also conclude that fifty-six of the remaining fifty-seven convictions are multiplicitous. We accordingly merge all those convictions into one conviction of one count of sexual exploitation of a minor. We also conclude that the trial court improperly enhanced the Defendant's sentences and improperly ordered consecutive sentencing. We remand for resentencing on his conviction.

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DAVID H. WELLES, JUDGE